

**In the Supreme Court**

**Appeal from the Court of Appeals**

[Jane E. Markey, Brian K. Zahra, and Helene N. White]

VALERIA HALIW and  
ILKO HALIW,

Plaintiffs - Appellants,

v

THE CITY OF STERLING HEIGHTS,

Defendant - Appellee

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SC: 125022

COA: 237269

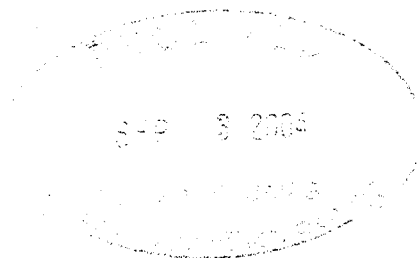
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**Brief on Appeal of Defendant - Appellee**

**Oral Argument Requested**

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## **COUNTER-STATEMENT OF THE BASIS OF JURISDICTION**

On June 3, 2004, this Michigan Supreme Court, pursuant to MCR 7.302(G)(1), issued an Order granting the Plaintiffs – Appellants Valeria Haliw and Ilko Haliw's, ("Plaintiff's") application for leave to appeal from the August 5, 2003 judgment of the Court of Appeals. (Haliw v City of Sterling Heights, 470 Mich. 869; 682 NW2d 84 (2004).) (**Appendix at p. 47a**)

The June 3, 2004 Order of this Michigan Supreme Court directed that the application for leave to appeal is granted limited to the issue of whether appellate attorney fees and costs are recoverable as case evaluation sanctions under MCR 2.403(O). This Michigan Supreme Court's June 3, 2004 Order provides as follows:

"The application for leave to appeal the August 5, 2003 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issue whether appellate attorney fees and costs are recoverable as case evaluation sanctions under MCR 2.403(O)." (Haliw v City of Sterling Heights, 470 Mich. 869; 682 NW2d 84 (2004).) (**Appendix at p. 47a**)

**COUNTER-STATEMENT OF THE QUESTION INVOLVED**

- I. WHETHER APPELLATE ATTORNEY FEES AND COSTS ARE RECOVERABLE  
AS CASE EVALUATION SANCTIONS UNDER MCR4 2.403(0)?

Plaintiffs/Appellants say: "No"

Defendant/Appellee says: "Yes"

The Michigan Court of Appeals says: "Yes"

The Trial Court says: "No"



## **I. COUNTER STATEMENT OF STANDARD OF REVIEW**

The Defendant agrees that the issue presented involves the interpretation of a court rule. The standard of review is de novo.<sup>1</sup>

“The proper interpretation of a court rule is a question of law and is subject to review de novo.” (Dessart v Burak, 470 Mich 37; 678 NW2d 615 (2004).)

## **II. COUNTER-STATEMENT OF RELEVANT AND CONTROLLING FACTS**

On January 29, 1996, Plaintiff Valeria Haliw was walking on a snow-covered sidewalk when she slipped and fell on a patch of ice that had formed on the sidewalk at the spot where two sections of the sidewalk met to form a depression. (Haliw v City of Sterling Heights, 257 Mich. App 689; 669 NW2d 563, 565 (2003).) (**Appendix at p. 31a**) On January 6, 1997, Plaintiffs sued the Defendant under the highway/sidewalk exception to governmental immunity. (Haliw, 669 NW2d at p. 565.) (**Appendix at p. 31a**) The Plaintiffs’ rejected the mediation (now “case evaluation”) award. (Haliw, 669 NW2d at p. 565.) (**Appendix at p. 31a**) On September 8, 1997, the Trial Court denied the Defendant’s Motion for Summary Disposition under MCR 2.116(C)(7) and (10). (Haliw, 669 NW2d at p. 565-566) (**Appendix at p. 32a**)

The Defendant appealed the trial court’s denial of Summary Disposition to the Michigan Court of Appeals. (**Appendix at p. 8b**) On October 5, 1999, the Michigan Court of Appeals affirmed the Trial Court’s denial of the Defendant’s Motion for Summary Disposition. (Haliw v Sterling Heights, unpublished opinion per curiam of the Court of Appeals, decided [October 5, 1999] (Docket No. 206886).) (**Appendix at p.**

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<sup>1</sup> Marketos v American Employers Ins Co, 465 Mich. 407; 633 NW2d 371 (2001).

**8b)** The Defendant then appealed the Michigan Court of Appeals' ruling to this Michigan Supreme Court. (**Appendix at p. 10b**) On July 13, 2000, this Michigan Supreme Court granted the Defendant's Application for Leave to Appeal. (Haliw v City of Sterling Heights, 462 Mich. 912; 613 N.W.2d 727 (2000).) (**Appendix at p. 10b**) On June 12, 2001, this Michigan Supreme Court reversed and directed that the Defendant be granted Summary Disposition. (Haliw v City of Sterling Heights, 464 Mich. 297; 627 N.W.2d 581 (2001).) (**Appendix at p 11b.**)

### **III. COUNTER STATEMENT OF RELEVANT PROCEDURAL FACTS**

On remand to the Trial Court, the Defendant moved for case evaluation sanctions pursuant to MCR 2.403(O) based upon the Plaintiffs' rejection of the case evaluation award in favor of the Plaintiff. (Haliw, 669 NW2d at p. 566) (**Appendix at p. 32a**) The Defendant specifically requested an award of appellate attorney fees. (Haliw, 669 NW2d at p. 566) (**Appendix at p. 32a**) The Trial Court awarded sanctions, but declined to award any attorney fees incurred by the Defendant in the appellate proceedings. (Haliw, 669 NW2d at p. 566) (**Appendix at p. 32a**) The Defendant appealed that ruling of the Trial Court to the Michigan Court of Appeals. The Plaintiffs cross-appealed from the Trial Court's award of attorney fees incurred by the Defendant in Trial Court proceedings. On August 5, 2003, the Michigan Court of Appeals issued an Opinion ruling that the term "actual costs", as it appears in MCR 2.403, includes appellate attorney's fees and costs. (Haliw, 257 Mich. App at p. 689.) (**Appendix at p. 31a**)

"This case presents the question whether "actual costs," as provided in MCR 2.403(O), include reasonable appellate attorney fees necessary to obtain a favorable verdict after rejection of a case evaluation. [FN1] We hold that they do, and accordingly, reverse

and remand for further proceedings in the trial court.” (Haliw, 257 Mich. App at p. 691.) (**Appendix at p. 31a**)

The Michigan Court of Appeals remanded the case to the Trial Court for a review of all of the costs incurred by the Defendant, including trial and appellate attorney fees, to determine its actual costs under MCR 2.403(O)(6) and to determine whether unusual circumstances exist to adjust the “actual costs” in the interest of justice.

“We vacate the order granting defendant's motion for case evaluation sanctions and remand this matter to the trial court for further proceedings consistent with this opinion.” (Haliw, 257 Mich. App at p. 710.) (**Appendix at p. 40a, 41a**)

On November 12, 2003, the Plaintiffs filed an Application for Leave to Appeal to this Michigan Supreme Court. On June 3, 2004, this Michigan Supreme Court, pursuant to MCR 7.302(G)(1), issued an Order granting the application for leave to appeal from the August 5, 2003 judgment of the Court of Appeals, limited to the issue of whether appellate attorney fees and costs are recoverable as case evaluation sanctions under MCR 2.403(O). (Haliw v Sterling Heights, 470 Mich 869; 682 NW2d 84 (2004).) (**Appendix at p. 47a**)

#### IV. SUMMARY OF THE ARGUMENT AS REQUIRED BY MCR 7.302(B)

In its August 5, 2003 Opinion, the Michigan Court of Appeals properly ruled that “actual costs”, under MCR 2.403(O)(6) include appellate attorney fees. (Haliw, 257 Mich. App at p. 710.) (**Appendix at p. 40a, 41a**) This ruling is consistent with the rules of statutory construction because the interpretation is consistent with the plain meaning in MCR 2.403.<sup>2</sup> MCR 2.403(O)(6) defines “actual costs” as a reasonable attorney fee for “services” necessitated by a party’s rejection of the case evaluation award. The term “attorney fee” is defined by the dictionary as the charge to a client for services performed. Here, the Defendant was charged for appellate services performed necessitated by the Plaintiff’s rejection of the case evaluation award. Any plain reading of the term “attorney fee” includes appellate attorney fees. The award of appellate attorney fees also furthers the purpose and object of the court rule. MCR 2.403 is designed to foster settlement of disputes by placing the risk of attorney fees on a party that rejects a case evaluation award and thereby “necessitates” additional attorney fees. If a party is at risk for appellate attorney fees and costs by rejecting, the party remains under pressure to resolve the matter and the intent of the court rule is promoted. The Michigan Court of Appeals has previously ruled that the applicable verdict for determining sanctions is the ultimate “verdict” rendered after appellate review. MCR 2.403(O) is clear that if a party has rejected a case evaluation award and the action proceeds to verdict, that party must pay the other parties’ attorney fees necessitated by the rejection unless the verdict is more favorable. As a result, any appellate attorney

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<sup>2</sup> MCR 2.403(O) does not expressly exclude the awarding of appellate attorney’s fees.

fees pre-dating the ultimate verdict after appeal are included under the clear language of the Court Rules. The Michigan Court of Appeals properly ruled that “actual costs” within the meaning of MCR 2.403(O) (6) include reasonable appellate attorney fees.

## **V. LEGAL ARGUMENTS**

### **A. Appellate Attorney Fees and Costs Are Recoverable As Case Evaluation Sanctions Under MCR 2.403(O).**

#### **Standard of Review = De Novo**

#### **1. The Michigan Court of Appeals Ruling That Actual Costs within the Meaning of MCR 2.403(O) Includes Reasonable Appellate Attorney Fees Conforms with the Rules of Statutory Interpretation.**

This Michigan Supreme Court granted the Plaintiff’s Application for Leave limited to the issue of whether appellate attorney fees and costs are recoverable as case evaluation sanctions under MCR 2.403(O). (**Appendix at p. 47a**) This Michigan Supreme Court has previously ruled that general principles of statutory construction are to be applied when interpreting the meaning of a court rule.

**“This Court applies principles of statutory interpretation to the interpretation of court rules.” (Hinkle v Wayne County Clerk, 467 Mich. 337, 340; 654 NW2d 315 (2002).) (Emphasis Added)**

According to this Michigan Supreme Court, if the language of a court rule is plain and unambiguous, the courts must apply the meaning plainly expressed.<sup>3</sup>

**“When the language is unambiguous, we must enforce the meaning plainly expressed, and judicial construction is not permitted.” (Hinkle v Wayne County Clerk, 467 Mich. 337, 340; 654 NW2d 315 (2002).) (Emphasis Added)**

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<sup>3</sup> Common words must be understood to have their everyday plain meaning.

“Similarly, common words must be understood to have their everyday, plain meaning.” (**Marketos v American Employers Ins. Co.**, 633 NW2d 371, 375 (2001).)

However, if construction of a court rule is necessary, then a court's review is guided by applying the plain language of the rule giving effect to the ordinary meaning of the words used in light of the "purpose and the object" to be accomplished.

**"A court rule should be construed in accordance with the ordinary and approved usage of the language." St. George Greek Orthodox Church v. Laupmanis Associates, PC, 204 Mich. App. 278, 282, 514 N.W.2d 516 (1994). "It should also be construed in light of its purpose and the object to be accomplished by its operation." Id." (Dessart v Burak, 470 Mich 37; 678 NW2d 615 (2004).) (Emphasis Added)**

Here, MCR 2.403(O)(6) provides that actual costs include a reasonable attorney fee for services necessitated by the rejection of the mediation evaluation:

**"(6) For the purpose of this rule, actual costs are**

**(a) those costs taxable in any civil action, and**

**(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation." (MCR 2.403(O)(6).) (Emphasis Added)**

**a. The Term "Attorney Fee" As It Appears in MCR 2.403(O)(6)(b) Includes Appellate Attorney Fees.**

According to this Michigan Supreme Court's rulings in Halloran v Bahn, 470 Mich 572; 683 NW2d 129 (2004), an undefined term must be given its plain meaning and it is proper to consult a dictionary for a definition.

**"Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." (Halloran, 683 NW2d at p. 132) (Emphasis Added)**

Black's Law Dictionary defines the term "attorney's fees" as the charge to a client for services performed for the client.

**“attorney’s fees. The charge to a client for services performed for the client, such as an hourly fee, a flat fee, or a contingent fee.”**  
(Black’s Law Dictionary, Seventh Edition (1999).) (Emphasis Added)

Applying this definition, the term “attorney’s fees” would include fees for services rendered regardless of whether they were services performed at the appellate level or at the trial court level. A careful reading of MCR 2.403(O)(6) confirms that this is the definition intended. While the dictionary defines “attorney fee” as the charge to a client for “services” performed, the language of MCR 2.403(O)(6) also uses the term “services”. MCR 2.403 defines actual costs as a reasonable attorney fee for “services” necessitated by the rejection of the evaluation.

(c) **a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.”** (MCR 2.403(O)(6).) (Emphasis Added)

Black’s Law Dictionary defines “service” as the act of doing something useful in exchange for the payment of a fee.

“The act of doing something useful for a person or company for a fee” (Black’s Law Dictionary, Seventh Edition (1999).)

As a result, a plain reading of the term “attorney fee” dovetails with the actual language of MCR 2.403(O)(6). Here, the performing of appellate legal services fits within the definition of “attorney fee” because it is a “service” on behalf of the client.

The Plaintiff, however, wants this Michigan Supreme Court to re-draft MCR 2.403(O)(6) to modify and limit the term “attorneys fees” to somehow read “trial court attorneys fees only”. The language of MCR 2.403(O)(6) does not limit the term “attorney’s fees” in this manner. A plain reading of the term “attorney’s fees” -- as it appears in MCR 2.403(O)(6) -- means attorneys fees charged to a client for services

performed. The Defendant in this matter as charged for appellate attorneys' services, necessitated by the Plaintiff's rejection of the case evaluation award. These appellate attorney fees fit within the term "attorney's fees" as that phrase is used in MCR 2.403(O)(6).

b. **Including Appellate Attorney Fees As Actual Costs Will Further the Purpose and Object of MCR 2.403.**

Including appellate attorney's fees as "actual costs" will further the overall purpose and object of MCR 2.403. If additional analysis of the phrase "attorney fee" is required, then this Michigan Supreme Court, pursuant to the rules of statutory construction, must look at the plain meaning of the term "attorney fee" in light of the purpose and object of MCR 2.403(O). It is well established that the overall purpose of MCR 2.403(O) is to encourage settlement and avoid protracted litigation by placing the burden of litigation costs on the rejecting party.

"The policy behind the **mediation sanction rule** is to place the burden of litigation costs upon the party who insists upon trial by rejecting a proposed **mediation award**" (Rafferty v Markovitz, 461 Mich 265; 602 NW2d 367 (1999).)

**"The overall purpose of the mediation rule is to encourage settlement and deter protracted litigation. The purpose behind the mediation sanction rule is to place the burden of litigation costs upon the party which requires a trial by rejecting a proposed mediation award."** (Michigan Basic Property Ins v Hackert Furniture, 194 Mich App 230, 235; 486 NW2d 68 (1992).) (Emphasis Added)

If actual costs under MCR 2.403(O)(6) include appellate attorneys fees, then parties assessing whether to accept or reject case evaluation sanctions will include in their analysis the potential "burden" of having to pay appellate attorney fees. This will



promote settlement. Interestingly, the Michigan Court of Appeals ruled in this case that to exclude appellate attorney fees would “frustrate” the purpose of MCR 2.403.

**“To exclude appellate attorney fees would frustrate the purpose of the rule to impose litigation costs on the rejecting party by allowing the rejecting party to avoid those fees and instead “burden [the prevailing party] because of an error of law on the part of the trial court.” (Haliw, 669 NW2d at p. 567) (Appendix at p. 36a) (Emphasis Added)**

As a result, the inclusion of appellate attorney fees as actual costs favors the purpose and object of MCR 2.403 by promoting settlement and deterring protracted litigation.

**2. The Conclusion that Actual Costs under MCR 2.403 Include Appellate Attorneys Fees is Supported by the Fact That a Trial is Not Necessary to Trigger Actual Costs Under MCR 2.403.**

Pursuant to the language contained in MCR 2.403, a trial is not necessary to trigger case evaluation sanctions. The Michigan Court of Appeals properly noted that the 1997 amendment to MCR 2.403(O)(1) removed the requirement that sanctions apply only when the action proceeds to trial.

**“Further, the 1997 amendment removed the requirement of MCR 2.403(O)(1) that sanctions apply when the ‘action proceeds to trial,’ thus de-emphasizing ‘trial’ as the sole or determinative proceeding in regards to a rejection of a case evaluation.” (Haliw, 669 NW2d at p. 567) (Appendix at p. 33a)**

In fact, MCR 2.403(O)(1) was amended so that the phrase “and the action proceeds to trial” was changed to “and the action proceeds to verdict”. Thus, a trial is not the sole or determinative proceeding with regard to rejection of a case evaluation award. Instead, the determinative proceeding is the ultimate “verdict” which can include, by way of example, a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. The use of the term “verdict” has other implications relevant to the issue now before this Court.

3. **The Definition of the Term “Verdict” as it Appears in MCR 2.403(O)(1) Supports the Conclusion that Appellate Attorney Fees Are to be Included As Costs Under MCR 2.403(O)(6).**

MCR 2.403(O)(1) is clear that in order to determine whether “actual costs” are to be awarded, a court must assess whether the “verdict” is more favorable to the rejecting party than the case evaluation award. The use and placement of the word “verdict” is critical.

“(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless **the verdict** is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.” (MCR 2.403(O)(1).) (Emphasis Added)

MCR 2.403(O)(2) defines a “verdict” to include:

“2) For the purpose of this rule “verdict” includes,  
(a) a jury verdict,  
(b) a judgment by the court after a nonjury trial,  
(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.” (MCR 2.403(O)(2).)

MCR 2.403(O)(3) provides that a “verdict” is considered more favorable to a defendant if it is more than 10 percent below the evaluation and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation.

“the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.” (MCR 2.403(O)(3).)

In 1992, the Michigan Court of Appeals examined this term “verdict” as it appears in MCR 2.403(O)(1) and ruled that it means the “ultimate verdict” after appellate review is complete.<sup>4</sup>

**“We conclude that it is the ultimate verdict that the \*375 parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O).” (Keiser v Allstate Insurance Company, 195 Mich App 369, 374-375; 491 NW2d 581 (1992).) (Emphasis Added)**

In 1997, the Michigan Court of Appeals relied on Keiser and again ruled that it is the ultimate verdict after “appellate review” that must be measured against the mediation evaluation in order to determine if sanctions should be imposed.

**“However, we need not address these issues because the verdict itself no longer stands. ‘[I]t is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O).’” (Keiser v. Allstate Ins. Co., 195 Mich.App. 369, 374-375, 491 N.W.2d 581 (1992).’ ” (Hyde v University of Michigan Regents, 226 Mich App 511; 575 NW2d 36, 43 (1997).)**

The fact that the term “verdict” applies to the verdict after appellate review is controlling in this case. Before determining whether “actual costs” are to be assessed

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<sup>4</sup> In the case at hand, the Michigan Court of Appeals in its Opinion, cited to Keiser, and agreed that the ultimate “verdict” is the verdict after appellate review.

**“Further, the 1997 amendment removed the requirement of MCR 2.403(O)(1) that sanctions apply when “the action proceeds to trial,” thus de- emphasizing “trial” as the sole or determinative proceeding in regards to \*\*569 awarding sanctions after rejection of a case evaluation. Moreover, this Court has held that it is the ultimate “verdict” after appellate review that controls whether sanctions are appropriate under MCR 2.403(O).” (Haliw, 669 NW2d at p. 567.) (Appendix at p. 34a, 35a) (Emphasis Added)**

under MCR 2.403(O)(1), a “verdict” must be achieved which is then compared to the case evaluation award. Obtaining this verdict after appeal obviously makes it clear that appellate litigation is contemplated under the rule. These appellate attorney’s fees are not required if the parties accept case evaluation. MCR 2.403(O)(6) is very clear that “actual costs” include attorney’s fees necessitated by the rejection of the case evaluation. Consequently, because “actual costs” means attorneys fees necessitated by the rejection of the case evaluation, actual costs must include appellate attorney’s fees which were required to obtain the verdict. Based on this, the Michigan Court of Appeals was right when it ruled, in part, as follows:

“Accordingly, we hold that appellate attorney fees may be awarded under MCR 2.403(O)(6)(b) because (1) they are not excluded, (2) a trial is not necessary to trigger sanctions, and (3) the applicable \*699 “verdict” for determining sanctions is that rendered after appellate review.” (Haliw, 669 NW2d at p. 567) (Appendix at p. 35a) (Emphasis Added)

4. In Ruling That Appellate Attorney’s Fees Are Recoverable as Case Evaluation Sanctions Under MCR 2.403(O), the Michigan Court of Appeals Properly Rejected the Reasoning in American Casualty Co v Costello, 174 Mich. App. 1; 435 NW2d 760 (1989) and Giannetti Bros Construction Co v City of Pontiac, 175 Mich App 442; 438 NW2d 313 (1989).

In ruling that appellate attorney’s fees are recoverable as case evaluation sanctions, the Michigan Court of Appeals properly rejected the reasoning in American Casualty Co v Costello, 174 Mich. App 1; 435 NW2d 760 (1989) and Giannetti Bros Construction Co v City of Pontiac, 175 Mich. App 442; 438 NW2d 313 (1989). The Court of Appeals started its analysis of American Casualty and Giannetti by noting that, because both of these cases were decided in 1989, they are not binding precedent.

**“First, neither American Cas Co nor Giannetti Bros Constr. Co., is controlling precedent because each was decided before November 1, 1990.” (Haliw, 669 NW2d at p. 567.) (Appendix at p. 37a) (Emphasis Added)**

The Court of Appeals relied on MCR 7.215(J)(1):

**“(1) *Precedential Effect of Published Decisions.* A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.” (MCR 7.215(J)(1).) (Emphasis Added)**

After noting that it was not bound by American Casualty and Giannetti, the Michigan Court of Appeals ruled that it rejected the reasoning in these two cases.

**“Second, the court rule interpreted in each case has been significantly amended since each case was decided in 1989. Finally, we do not concur in the implicit reasoning of the panel in American Cas Co. supra that appellate attorney fees may only be obtained under MCR 7.216(C) which provides for the recovery of actual damages if an opposing party pursues a vexatious appeal.” (Haliw, 669 NW2d at p. 567) (Appendix at p. 37a) (Emphasis Added)**

In American Casualty, the plaintiff filed a lawsuit seeking reimbursement of amounts expended pursuant to its surety obligations on a probate executor bond. Following a jury verdict for defendants, the trial court awarded mediation sanctions to defendants pursuant to MCR 2.403(O).

In connection with plaintiff's appeal from the adverse jury verdict, the American Casualty defendants requested that the case be remanded to the trial court in order that the award of mediation sanctions could be supplemented to include the costs and attorney fees incurred by defendants during the appeal. The Court of Appeals in American Casualty declined to do so, stating, in part, as follows:

“We believe that the mediation sanctions provided for in MCR 2.403(O) are only intended to apply through final judgment at the trial court level. The trial court in this case has awarded actual expenses for trial activities as a mediation sanction pursuant to MCR 2.403(O). **Sanctions for appellate expenses are specifically set forth in MCR 7.216(C).** Said rule does not provide for mediation sanctions for appellate activities. . . . Defendant's request to supplement the trial court's award of mediation sanctions under MCR 2.403(O) is denied.” (American Casualty, 174 Mich. App. at 13.) (Emphasis Added)

The Court of Appeals in American Casualty concluded that appellate attorney fees were not awardable under MCR 2.403(O) because sanctions for appellate expenses are provided for in MCR 7.216(C). In Giannetti, the Court of Appeals came to the same conclusion based on the same reasoning.

In Giannetti, the case had proceeded to trial after both sides had rejected the mediation award. Plaintiff appealed from an adverse judgment entered following a trial, but the Court of Appeals affirmed in an unpublished decision. Defendant then filed a bill of costs with the trial court, including a claim for attorney fees under the mediation rule then in effect, GCR 1963, 316. The trial court held that defendant's motion for costs was not timely filed. Defendant appealed, and the Court of Appeals in a reported decision reversed, holding that the motion for costs was timely filed and remanded for a determination of actual costs. On remand, the trial court granted defendant's motion for costs, but declined to award post-judgment attorney fees as mediation sanctions. Defendant again appealed.

In addressing whether appellate attorney fees were available, the Court of Appeals in Giannetti, relied on the analysis in American Casualty and denied appellate attorney fees.

“Post-judgment appellate attorney fees do not fall within the realm of mediation sanctions awardable under the court rules. Accordingly, neither trial court abused its discretion in denying them.” (Giannetti, 438 NW2d at p. 316.)

Thus, American Casualty and Giannetti established the rule that post-judgment appellate attorney fees and costs are not recoverable as case evaluation sanctions because appellate attorney’s fees are solely controlled under MCR 7.216(C) and not under MCR 2.403.

Here, the Michigan Court of Appeals properly took issue with this reasoning and properly noted that the purposes served by MCR 2.403(O) and MCR 7.216(C) are completely different.

**“Moreover, MCR 7.216(C) and MCR 2.403(O) serve different purposes. While, MCR 2.403(O) is designed to encourage settlement and deter protracted litigation . . . MCR 7.216(C) deters clear abuse of the appellate process.”** (Haliw, 669 NW2d at p. 567) (**Appendix at p. 38a**) (Emphasis Added)

The purpose and object behind MCR 2.403 is to encourage settlement and avoid protracted litigation. (See: Michigan Basic Property Insurance v Hackert, 194 Mich App 230; 486 NW2d 69 (1992).) However, MCR 7.216 is designed to prevent vexatious appellate proceedings. MCR 7.216(C)(1) specifically defines a vexatious appeal as one where:

**“(C) Vexatious Proceedings.**

(1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.” (MCR 7.216)

MCR 7.216 is very similar to MCR 2.114 which, at the trial court level, provides sanctions when a party interposes a document for an improper purpose such as to harass or to cause undue delay, without any link to the actual outcome of the case.

**“(D) Effect of Signature.** The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

**(E) Sanctions for Violation.** If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.”(MCR 2.114)

As a result, MCR 2.114 provides for sanctions if an attorney or party signs a document which is intended to harass or delay. Similarly, MCR 7.216 provides for relief where a



party brings a vexatious appeal which is designed to harass or delay. Neither are dependent on the ultimate verdict.

While MCR 7.216 provides for appellate attorneys fees where a party has brought a vexatious appeal, it provides no relief to a litigant who ultimately prevails in the trial court after a successful appeal. Obviously, a successful appellant has not pursued a vexatious appeal. If the Plaintiff were right and the only recourse for appellate attorney fees were those provided under MCR 7.216, then the Defendant in this case would not have any appellate attorney fees available to it at all. Here, the Defendant sought the original appeal and was successful at this Michigan Supreme Court. Because the Defendant sought the appeal and was successful, the appeal is not vexatious. As a result, under the Plaintiff's reading of MCR 2.403, the Defendant would be forestalled from seeking or collecting any appellate attorney fees.

**B. The Plaintiff's Argument's Raised in His Brief Are Suspect.**

**1. Application of MCR 2.403 Does Not Require an Examination Into A Parties "Reasoning" in Seeking an Appeal.**

The Plaintiff argues that MCR 2.403(O)(6) defines actual costs as a reasonable attorney fee necessitated by the rejection of the evaluation. The Plaintiff then contends that the term "Necessitated" contained in MCR 2.403(O)(6) requires an examination into the underlying rationale of the Plaintiff seeking an appeal and incurring appellate attorney fees. Here, the Plaintiff argues that the Defendant's appeal and appellate attorney fees were not necessitated by the Plaintiff's rejection of case evaluation but by the Defendant's hidden agenda to take this case to the appellate courts. The Plaintiff is wrong. Nowhere in the plain language of MCR 2.403(O)(6) does it state that a court must look into the hidden intent of a party to determine whether there appeal was

necessitated by the Plaintiff's rejection of case evaluation or some other hidden motive. If such an examination was required by MCR 2.403(O)(6) then courts would have to inject themselves into the minds of parties every time that a motion for case evaluations sanctions is sought. This would be an impossible result.

Moreover, the Michigan Court of Appeals has already examined the application of the term "necessitated" contained in MCR 2.403(O)(6) and ruled that it is a temporal demarcation requiring only that the party entitled to recover its reasonable attorney fees in defending or pursuing a claim have incurred the fees after the rejection of the evaluation.

**"We agree with Judge MacKenzie that the phrase "necessitated by the rejection" was intended as a temporal demarcation to permit recovery of reasonable attorney fees incurred after mediation is rejected, not before." (Michigan Basic Property Ins v Hackert Furniture, 194 Mich App 230, 236; 486 NW2d 68 (1992).) (Emphasis Added)**

Here, there is no question that attorney's fees including appellate attorney's fees were necessitated as a result of the Plaintiff's rejection of the case evaluation award.

**2. The Plaintiff Fear that Including Appellate Attorney Fees As Actual Costs Would Chill Appellate Litigation is Unfounded.**

The Plaintiff argues that if actual costs include appellate attorney fees then appellate litigation will be "chilled". The problem with this argument is that the purpose of MCR 2.403 is not to promote appellate litigation but to encourage settlement and deter protracted litigation by placing the burden of litigation on the party that required the case to proceed. (Michigan Basic Property Insurance v Hackert, 194 Mich App 230; 486 NW2d 69 (1992).) This purpose is served by a finding that actual costs under MCR 2.403(O)(6) include appellate attorney fees. If parties are burdened with appellate

attorney fees there will be a strong incentive which will encourage settlement and deter protracted litigation. Consequently, a finding that actual costs under MCR 2.403(O)(6) do not include appellate attorney fees would actually promote litigation and run counter to the overall purpose and intent of MCR 2.403(O)(6).

The Plaintiff also argues in the alternative that if actual costs include appellate attorney fees that appellate litigation will increase because if a party accepts case evaluation and another rejects, the accepting party will have every interest in appealing because his appellate fees could be bourn by the other party. The problem with this analysis is that it focuses on the wrong time period. The relevant time period to examine is the time when the parties have to accept or reject a case evaluation award. At the time when two parties have to decide whether to accept or reject case evaluation, they will be faced with the risk of paying appellate attorney fees. It is this potential burden of appellate attorney's fees which will encourage acceptance of the case evaluation award thus fostering settlement and avoiding protracted litigation.

### **3. The Plaintiff's Reliance on the McAuley Decision is Misplaced.**

Within her brief the Plaintiff also argues that the Michigan Supreme Court in **McAuley v General Motors**, 457 Mich 513; 578 NW2d 282, 286 (1998) ruled that a party cannot recover attorney fees under the Michigan Handicap Civil Rights Act and MCR 2.403. The Plaintiff then argues that because such double recovery of attorney fees is prohibited that appellate attorney fees are not recoverable under MCR 2.403 because they are provided for under MCR 7.216. The problem with this analysis is that this Michigan Supreme Court in McAuley ruled that recovery under the case evaluation rule is only prohibited if a prevailing party has already been fully reimbursed for

reasonable attorney fees through the operation of a statutory provision.

“Obviously, if the \*521 prevailing party has already been fully reimbursed for reasonable attorney fees through the operation of a statutory provision, in this case the attorney fee provision of the HCRA, there are no "actual costs" remaining to be reimbursed under the court rule. On the other hand, if the applicable statute limits the recovery of attorney fees to something less than a reasonable attorney fee and there are actual costs remaining, an additional award may be appropriate in some cases.” (McAuley v General Motors, 578 NW2d 282, 286 (1998).)

Here, the Defendant has not been and will not be reimbursed for its reasonable attorneys fees pursuant to MCR 7.216(C). As stated above, MCR 7.216(C) provides that appellate attorneys fees can be awarded where a party pursues a vexatious appeal. Here, the Defendant was the party which sought the appeal and the Defendants appeal was not vexatious. As a result, the Defendant has not and never will require any of its reasonable attorneys fees under MCR 7.216(C). Consequently, the reasoning in McAuley which prohibits duplicative recovery of reasonable attorneys fees is not relevant to the matter at hand.

**4. The Plaintiff's Reliance on the Language of MCR 2.403(O) is Misplaced.**

The Plaintiff argues that Michigan law is clear that the awarding of attorney fees is only allowed where a statute or court rule expressly allows for such an award. The Plaintiffs argue that because MCR 2.403 does not expressly provide for appellate attorneys fees that they cannot be awarded. The flaw in this reasoning is that MCR 2.403 unquestionable does allow for the award of attorneys fees. The fact that MCR 2.403(O)(6) defines “actual costs” to include attorney’s fees and does not limit these attorneys’ fees to trial court attorney’s fees is instructive. The phrase attorney’s fees means the fees of an attorney. Obviously appellate attorney fees are the fees of an

attorney. Consequently, the phrase attorney's fees is broad enough to include the award of both appellate and trial court attorney's fees. The Plaintiff wishes this court to engage in judicial activism and to edit MCR 2.403 in such a way that additional language is provided modifying attorneys fees to state "only trial court attorney's fees". This is impermissible.

**C. The Arguments Raised by the Amicus are Unfounded.**

The Amicus make several arguments as to why they believe that actual costs under MCR 2.403(O)(6) should not include appellate attorney fees. These arguments are unfounded and are addressed separately below.

**1. A Plain Reading of MCR 2.403 Does Support the Conclusion that Appellate Attorney Fees are Included As Actual Costs.**

The Amicus argue that a plain reading of MCR 2.403 does not support the conclusion that appellate attorney fees are included. Specifically, the amicus point out that the words appellate attorneys fees do not appear within MCR 2.403(O)(6) consequently appellate attorney fees were not intended. However, the problem with this analysis is that the phrase "attorney fees" as it appears within MCR 2.403(O)(6) would include appellate attorneys fees under its penumbra. As stated above, when looking at the plain meaning of the phrase "attorney fees" one can consult the dictionary. The dictionary defines attorney fees as a charge to a client for services performed. (Black's Law Dictionary, Seventh Edition (1999).) Here, the Defendant was charged for the appellate attorney services performed. Consequently, the plain reading of MCR 2.403 favors including appellate attorney fees.

2. **Reading MCR 2.403 (O)(6) to Include Appellate Attorney Fees as Actual Costs Does not Conflict with MCR 7.216.**

The Amicus argue that if appellate attorney fees are included within the definition of actual costs under MCR 2.403(O)(6), then a conflict will arise with MCR 7.216 which provides for sanctions where there is a vexatious appeal. This is not true. As stated above, MCR 2.403(O)(6) and MCR 7.216 serve completely different purposes. While the purpose of MCR 2.403(O)(6) is to promote settlement, the purpose of MCR 7.216 is to discourage vexatious appeals. There is no overlap.

3. **The Court of Appeals Did Not Exceed Its Jurisdiction in Ruling That Actual Costs Under MCR 2.403(O)(6) Includes Appellate Attorney Fees.**

The amicus appear to argue that Chapter 2 of the Michigan Court Rules, which includes MCR 2.403, only involves civil actions and that the Michigan Court of Appeals does not have original jurisdiction to entertain civil actions. According to the Amicus, the Michigan Court of Appeals only has jurisdiction to hear appeal as of right and by leave. While the Amicus is right that the Michigan Court of Appeals has jurisdiction to entertain appeals of right and those by leave, there is no court rule, statute or case law prohibiting the Michigan Court of Appeals from reviewing a Trial Court's interpretation of a court rule such as MCR 2.403. In fact, the review of the interpretation of a court rule is a question of law subject to de novo review.

"The proper interpretation of a court rule is a question of law and is subject to review de novo." (Dessart v Burak, 470 Mich 37, 39; 678 NW2d 615 (2004).)

4. **An Overall Reading of MCR 2.403 Does Not Lead To The Conclusion that Appellate Attorneys Fees Are Not To Be Included as Costs Under MCR 2.403(O)(6).**

The Amicus argue that an overall reading of MCR 2.403 favors a finding that appellate attorneys fees are not to be included as actual costs. In order to support this spurious contention, the Amicus argue that MCR 2.403(N)(1) provides that if a case evaluation award is rejected the matter proceeds to trial. The Amicus argue that because MCR 2.403(N)(1) does not mention the case proceeding to appeal after rejection of a case evaluation award that appellate attorney fees are not actual costs under MCR 2.403(O)(6). This argument makes no sense. It is not surprising that MCR 2.403(N)(1) does not indicate that if a case evaluation award is rejected it goes to the Court of Appeals. MCR 2.403(N)(1) does not provide an automatic right to appeal because there is no right to automatically appeal after a case evaluation award has been rejected. MCR 7.203 is quite clear that there is an appeal of right to the Michigan Court of Appeals when there is a final order and not after rejection of case evaluation.

5. **The Appellate Attorney Fees Are Necessitated by the Rejection of Case Evaluation.**

The amicus argue that MCR 2.403(O)(6) defines actual costs as attorneys fees for services necessitated by the rejection of case evaluation. The Amicus argue that appellate attorney fees are not necessitated by the rejection of case evaluation but by an incorrect trial court ruling. This argument is disingenuous. Obviously, if all parties accepted case evaluation then the matter would be resolved and there would be no need for additional litigation and attorneys fees. Once a party rejects the case must proceed and additional attorney fees for services are necessitated. Furthermore, a party may accept case evaluation and prevail at both the trial court and at the appellate

level. In such instances where a lower court ruling is affirmed the appeal is not necessitated by an erroneous lower court ruling. The Amicus logic in this regard is strained.

6. **MCR 2.403(O)(8) Does Not Demand that actual costs under MCR 2.403(O)(6) Not Include Appellate Attorney Fees.**

The Amicus argue that MCR 2.403(O)(8) provides that a request for costs under MCR 2.403 must be filed and served within 28 days after judgment. The Amicus argue that since this request for cost must be made within 28 days, it could not possibly include appellate attorney fees as there would not be any appellate resolution within 28 days. In response, the Defendant points out the following. First, although MCR 2.403(O)(8) provides that a request for costs must be filed and served within 28 days, there is nothing in MCR 2.403(O)(8) requiring that such a request be heard within 28 days. Second, if a judgment is appealed and is modified or reversed, a new judgment will have to be entered. It is this judgment – or ultimate verdict -- that is assessed to determine whether actual costs under MCR 2.403(O)(8) are rewarded. Once this judgment after appeal is entered then under MCR 2.403(O)(8), a party has 28 days in which to file and serve their request for costs.

**VI. CONCLUSIONS AND RELIEF REQUESTED**

The Michigan Court of Appeals properly ruled that “actual costs” under MCR 2.403(O) include reasonable appellate attorney fees. This ruling is consistent with the rules of statutory construction because the Michigan Court of Appeals’ interpretation follows the plain meaning expressed in MCR 2.403 and carries forward the intent of the court rule. MCR 2.403 is designed to foster settlement of disputes by placing the risk of attorney fees on a party that rejects a case evaluation award. If a party risks appellate



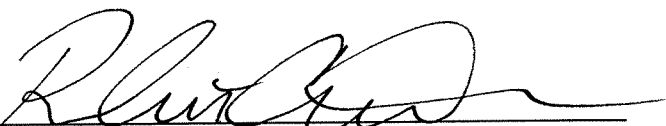
attorney fees, the party will be under a greater pressure to settle. As a result, the Michigan Court of Appeals interpretation is proper.

WHEREFORE, the Defendant/Appellee, City of Sterling Heights respectfully requests that this Honorable Michigan Supreme Court enter an Order:

- I. Affirming the Michigan Court of Appeals Opinion dated August 5, 2003; and
- II. Granting such other relief in favor of Defendant/Appellee as this Michigan Supreme Court deems just, equitable and appropriate.

Respectfully submitted,

O'REILLY RANCILIO P.C.

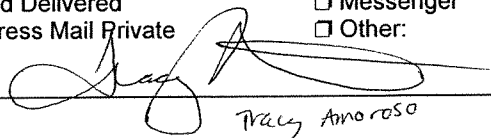
By:   
Robert Charles Davis (P40155)  
William N. Listman (P52030)  
Attorneys for Defendant/Appellee

Dated:

**PROOF OF SERVICE**

I served Defendant/Appellee's Brief on Appeal upon the attorneys of record and/or parties in this case on 9/2/04. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

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Tracy Amoroso